

PCS PRIMECO, L.P.

May 25, 1995

BY HAND

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Mail Stop Code 1170
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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Re: PCS PRIMECO, L.P.
- Opposition to NABOB, et al. Petition to Deny PRIMECO's MTA
PCS Applications
- PP Docket No. 93-253/ET Docket No. 92-100
- File Nos. 0004-CW-L-95, et al.

Dear Mr. Caton:

On behalf of PCS PRIMECO, L.P., enclosed for filing are an original and four copies of its Opposition to a Petition to Deny PRIMECO's eleven Block A/B MTA PCS Applications, which was filed jointly by the National Association of Black Owned Broadcasters, Percy Sutton and the National Association for the Advancement of Colored People, Washington Bureau. The microfiche copies of this filing will be submitted on Friday, May 26, 1995.

Please contact us should you have any questions concerning this filing.

Sincerely yours,

PCS PRIMECO, L.P.

William L. Roughton, Jr.
By: William L. Roughton, Jr.

cc: Rosalind K. Allen (by hand)
Regina Keeney (by hand)

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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Petition to Deny PCS PRIMECO, L.P.)
Applications for Broadband PCS Licenses)

File Nos. 00004-CW-L-95, 00011-CW-L-95,
00023-CW-L-95, 00025-CW-L-95,
00027-CW-L-95, 00031-CW-L-95,
00037-CW-L-95, 00043-CW-L-95,
00063-CW-L-95, 00071-CW-L-95,
00091-CW-L-95

DOCKET FILE COPY ORIGINAL

93-253

OPPOSITION TO PETITION TO DENY

PCS PRIMECO, L.P.

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May 25, 1995

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SUMMARY

PCS PRIMECO, L.P. (“PRIMECO”) opposes the Petition to Deny (“Petition”) jointly filed by the National Association of Black Owned Broadcasters, Inc., the National Association for the Advancement of Colored People, Washington Bureau (“NAACP”), and Percy Sutton (“Petitioners”), against PRIMECO’s long-form applications seeking MTA PCS license grants. The Petition is abusive of Commission processes and was filed solely for purposes of delay. Petitioners have provided no specific allegations of fact demonstrating that grant of PRIMECO’s applications would be inconsistent with the public interest, convenience and necessity.

None of Petitioners qualify as a party-in-interest with standing to file the instant Petition to Deny. Petitioners present only sparse, conclusory statements of competitive or economic harm; they will, in fact, enjoy pro-competitive benefits resulting from the very licensing scheme about which they complain.

Moreover, Petitioners’ claims are without merit because no statutory violation has occurred. Petitioners’ arguments are based on a complete misreading of the Budget Act and the Commission’s PCS licensing scheme requirements. The Commission has fully complied with its statutory obligations and has promoted designated entity participation through its bandwidth assignments, attribution rules and spectrum aggregation limits.

Furthermore, the Commission appropriately weighed the impact of the A/B auction winners’ purported “headstart” against the public interest in rapid deployment of PCS. A staggered licensing process, in fact, confers benefits on later licensees, and the cellular licensing

experience demonstrates that Petitioners' headstart concerns are grossly overstated. Significant competitive opportunities exist for C Block auction winners — and other new wireless entrants.

Finally, Petitioners' allegations that PRIMECO participated in concerted anti-competitive conduct during the A/B Block auctions are scandalous and unsupported. PRIMECO fully complied with the Commission's anticollusion and disclosure rules; further, the Department of Justice failed to initiate an antitrust investigation of the MTA auction at NAACP's request. PRIMECO's bidding activity at the auction was based on its individual business plans and strategies — it had no tacit or other agreement with other MTA bidders regarding the A/B licenses. Petitioners' anticompetitive claims are meritless.

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00063-CW-L-95, 00071-CW-L-95,
00091-CW-L-95

OPPOSITION TO PETITION TO DENY

PCS PRIMECO, L.P. ("PRIMECO")¹ hereby opposes the Petition to Deny ("Petition")² jointly filed May 12, 1995 by the National Association of Black Owned Broadcasters, Inc. ("NABOB"), the National Association for the Advancement of Colored People, Washington Bureau ("NAACP") and Percy Sutton³ against PRIMECO's 11 long-form (Form

¹ PRIMECO is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch Communications, Inc. and U S WEST, Inc.).

² This filing was consolidated with a Request for Stay of the A/B Block MTA licensing. While this consolidated filing was procedurally defective under the rules (*see* 47 C.F.R. § 1.44(e)), PRIMECO previously filed an opposition to the stay request. *See* PRIMECO Consolidated Opposition (PP Docket No. 93-253, ET Docket No. 92-100; File Nos. 0004-CW-L-95, *et al.*), filed May 19, 1995. PRIMECO hereby incorporates by reference this earlier filing. To the extent a waiver is needed for acceptance of the incorporated filing, PRIMECO hereby requests such waiver.

³ The parties are referred to herein collectively as "Petitioners."

600) applications seeking MTA PCS license grants.⁴ Petitioners have filed their Petition against all 99 applications filed by the eighteen winning A and B Block MTA bidders.

For the reasons stated herein, the Petition is abusive of Commission processes and was filed for one purpose alone — delay. Petitioners are not parties-in-interest and have provided no evidence that grant of the PRIMECO applications would be *prima facie* inconsistent with the public interest, convenience and necessity — as required by Section 309(d)(1) of the Communications Act. The Petition should be denied and PRIMECO's applications granted.⁵

I. INTRODUCTION/STATEMENT OF INTEREST

As noted, PRIMECO was the winning bidder for 11 markets in the A/B Block MTA auction. On November 17, 1994, PRIMECO submitted a \$54,666,431 upfront payment to participate in the auction; thereafter, on March 20, 1995, PRIMECO submitted an additional \$166,778,769 to the Commission to bring its total down payment up to 20% of the winning bid amount for the 11 markets won (or \$221,445,200). On April 5, 1995, PRIMECO submitted 11

⁴ PRIMECO submitted winning bids in the following MTA markets: Chicago; Dallas-Ft. Worth; Tampa-St. Petersburg-Orlando; Houston; Miami-Ft. Lauderdale; New Orleans-Baton Rouge; Milwaukee; Richmond-Norfolk; San Antonio; Jacksonville; and Honolulu.

⁵ Petitions which are “seriously procedurally or substantively” defective cause significant delays and burdens for the licensee involved and the Commission’s administrative processes, contrary to the public interest. *Los Angeles License Renewals*, 68 FCC 2d 75 (1978). Whether a Petition is an abuse of process hinges on whether the Petition (1) is responsive to issues in the proceeding, and (2) aids, or could reasonably be expected to aid, in the resolution of legal, factual, or public policy concerns. *See General Communications Inc. v. Alascom Inc. (Abuse of Process Allegations)*, Memorandum Opinion and Order, 4 FCC Rcd. 7447, 7453 (1988). PRIMECO respectfully submits that the instant Petition does neither and was filed for purposes of delay only.

long-form Form 600 applications for its winning MTA markets. Upon license grants, an additional \$885,780,000 will become due from PRIMECO.

Any delay in the processing of the A/B Block licenses is tremendously prejudicial and detrimental to PRIMECO (as well as to the other winning MTA license applicants).⁶ Importantly, licensing delay directly contravenes critical Congressional objectives for the rapid deployment of PCS services and increased wireless competition — and thus disserves the public interest.⁷ PRIMECO has demonstrated its financial, legal and other qualifications to be a Commission licensee, and is ready, willing and able to commence PCS construction and deployment. Petitioners have provided no legitimate reason for denial of the PRIMECO applications. The Commission should expeditiously consider and deny the Petition.

II. PETITIONERS ARE NOT PARTIES IN INTEREST

Only parties who provide specific allegations of fact sufficient to show that they are parties-in-interest, and that a grant of the challenged application would be *prima facie*

⁶ See letter from Mr. George F. Schmitt, President and Chief Executive Officer, PRIMECO, to Chairman Reed E. Hundt (Mar. 23, 1995). Together, winning bidders have submitted a total of \$1.4 billion in deposit money with the Commission. Upon license grants, an additional \$5,615,523,038 will be due from PRIMECO and the other Block A/B MTA market winners (representing the total winning bid amount of \$7,019,403,797 for the 99 licenses).

⁷ See 47 U.S.C. § 309(j)(3)(A) (Supp. 1995).

inconsistent with the public interest, convenience and necessity, may file petitions to deny.⁸ In determining whether a petitioner qualifies as a “party in interest,” the Commission applies general, judicial standing principles which require a petitioner to demonstrate (1) “actual or imminent” injury in fact; (2) that the injury is “fairly traceable” to the challenged decision; and (3) that the injury is “likely” to be “redressed by a favorable decision.”⁹ Petitioners’ sparse and conclusory statements do not satisfy the necessary criteria and they fail to qualify as parties-in-interest.

A. Percy Sutton is Not a Party-in-Interest

Percy Sutton claims standing as an “African American planning to bid for C Block licenses.”¹⁰ Percy Sutton did not participate in the A/B Block auctions, and is merely a self-professed prospective bidder in the C Block auction. As such, Mr. Sutton cannot demonstrate the likelihood of substantial injury necessary to confer party-in-interest status.¹¹ Thus, Mr. Sutton

⁸ 47 U.S.C. § 309(d)(1). Further, the requisite allegations of fact “shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.” *Id.*

⁹ *See Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application, Memorandum Opinion and Order*, 82 FCC 2d 89, 95 (1980) (“*Petition to Deny Order*”); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *WLVA Inc. v. FCC*, 459 F.2d 1286, 1298 n.36 (D.C. Cir. 1972); *Far East Broadcasting Co., Inc.*, 58 FCC 2d 60 (1976).

¹⁰ *See* Petition at 2 and accompanying declaration.

¹¹ *Family Television Corp.*, 59 Rad. Reg. 2d 1344 (1986) (potential competitor had no standing to file petition to deny an application for a transfer of control of an existing TV station); *A-C Broadcasters*, 10 FCC 2d 256 (1967) (applicant for broadcast station was not a party in interest because the claimed injury rested on “pure conjecture”). *But see Committee for Effective Cellular Rules v. FCC*, No. 93-1220, 1995 U.S. App. LEXIS 10219 (D.C. Cir. May 9, 1995) (“*CECR*”) (association had standing to challenge, on behalf of cellular applicants, FCC rules reducing unserved cellular areas). *CECR* is distinguishable from the instant Petition, however, because in *CECR* the injury arose when, by virtue of a change in the Commission’s rules, a class of applicants was precluded

(continued...)

lacks status as an actual aggrieved party for failure to show that an actual injury exists or imminent injury will occur.

B. NABOB and the NAACP Also Fail to Qualify As Parties-in-Interest

NABOB claims it is a party-in-interest because it represents current Commission licensees, primarily broadcasters, and prospective minority applicants in the PCS auctions. NAACP claims that it represents both the general “public,” whose interests will allegedly be harmed if the PCS industry does not develop competitively, and minority entrepreneurs who plan to bid in the auctions.¹² NABOB and the NAACP allege that their members will suffer a competitive disadvantage if the A/B Block auction winners are licensed now, and that the Commission will violate its statutory mandate by affording the A/B Block winners such an advantage.

An organization is a party-in-interest on behalf of its members if it satisfies the three requirements of “associational standing.”¹³ Under the test for associational standing, each of the following three requirements must be satisfied: (1) members must otherwise have standing to sue in their own right;¹⁴ (2) the interest the organization seeks to protect must be germane to the

¹¹ (...continued)
from applying for certain cellular properties. By contrast, Petitioners herein are not precluded from bidding and no injury is conferred on this basis.

¹² Petition at 2 and accompanying declarations.

¹³ *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977). See also *CECR supra* note 11.

¹⁴ *I.e.*, the members must be able to demonstrate actual or imminent harm fairly traceable to the challenged decision. See *supra* note 9 and accompanying text.

organization's purpose; and (3) neither the claim asserted nor the relief requested may require the participation of individual members in the lawsuit.¹⁵

NABOB and the NAACP cannot satisfy the first prong of the associational standing test because they have not demonstrated that their members will suffer actual or imminent injury-in-fact that is fairly traceable to a grant of the A/B Block applications.¹⁶ Speculative and conclusory allegations of competitive or economic harm such as the ones made here, do not sufficiently establish actual or imminent injury-in-fact so as to confer party-in-interest status.¹⁷ Moreover, even if the "harm" alleged was established with sufficient specificity, Petitioners have not demonstrated that there is a causal link between the injury and a grant of the A/B licenses.

In sum, Petitioners have not provided the Commission with specific allegations of fact sufficient to establish that competitive or economic harm is occurring now or will occur in the imminent future.¹⁸ Indeed, contrary to their claims of competitive harm, Petitioners will enjoy

¹⁵ *Hunt*, 432 U.S. at 342-43 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Petitioners cite a series of broadcast cases involving an organization's standing to seek denial of broadcast renewal applications. In those cases, the Commission held that groups such as the NAACP have standing if they represent members of the listening public, because listeners suffer injury in fact caused by the broadcaster's conduct. *See, e.g., United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Baltimore Area Renewals*, 89 FCC 2d 1183 (1982). The cases cited by Petitioners are inapposite here.

¹⁶ *See supra* at 4. As discussed above, individuals such as Percy Sutton, who claim status as potential bidders, do not have standing as parties-in-interest.

¹⁷ *Lester & Alice Garrison*, 6 FCC 2d 270 (1967) (minority stockholder in licensee corporation did not have standing as a party-in-interest because allegations of illegal conduct were patently speculative and conclusionary).

¹⁸ *See discussion infra* Section III.

pro-competitive benefits resulting from the PCS licensing scheme.¹⁹ Petitioners lack status as parties-in-interest.

III. PETITIONERS HAVE PROVIDED NO FACTS SHOWING THAT GRANT OF PRIMECO'S APPLICATIONS WOULD BE INCONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY

As noted above, Section 309(d)(1) of the Communications Act requires that the Petition contain specific allegations of fact sufficient to show that a grant of the licenses would be *prima facie* inconsistent with the public interest.²⁰ The Petition here, however, contains no specific allegations of fact to support its proponents' claims; more importantly, Petitioners' claims have no merit.

A. The Petition Contains No Properly Supported, Specific Allegations of Fact

It is well-established that petitions to deny must contain specific allegations of fact supported by signed affidavits from persons with personal knowledge of the facts.²¹ Petitions based on hearsay, opinion or broad generalizations do not satisfy the specificity requirement of Section 309(d)(1) and will be dismissed.²² In this case, Petitioners have included no facts or

¹⁹ See *Deferral of Licensing MTA Commercial Broadband PCS, Order*, PP Docket No. 93-253, at ¶¶ 6-7 (released Apr. 12, 1995) ("CI Order"). See *infra* notes 39-41 and accompanying text.

²⁰ 47 U.S.C. § 309(d)(1).

²¹ See 47 U.S.C. § 309(d)(1); see also 47 C.F.R. § 1.2108(c).

²² See *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985); *Texas RSA 2 Ltd. Partnership*, 7 FCC Rcd. 6584 (1992) (petition to deny based on "conclusory allegations unsupported by specific facts" dismissed for failure to satisfy Section 309(d)(1) (continued...))

factual affidavits to support their allegations. Rather, Petitioners have simply attached generalized “declarations” to the Petition and have made reckless charges without foundation.

B. No Statutory Violation Is Present

Petitioners allege that by licensing the A/B Block winners first, the Commission will countenance a violation of Section 309(j).²³ However, Petitioners’ arguments are based on a complete misreading of the Omnibus Budget Reconciliation Act of 1993 (“Budget Act”) and the Commission’s PCS licensing scheme requirements. In fact, no statutory violation has occurred in the PCS licensing scheme or through the MTA auction process.

1. The Commission Is Not Required to Guarantee That Designated Entities Obtain PCS Licenses in Each PCS Frequency Block

Under the Budget Act, Congress sought to facilitate the competitive and rapid deployment of PCS services to the public. Congress directed the Commission to establish a competitive bidding methodology for certain frequencies, and directed the Commission to “*seek to promote*” the following objectives in so doing:

- The development and rapid deployment of services without administrative and judicial delay;

²² (...continued)
requirements); *D&B Broadcasting Co., Inc.*, 69 FCC 2d 1116 (1978) (Commission cannot waive requirements of the Communications Act and therefore cannot accept improperly supported petitions to deny); *WFBM, Inc.*, 47 FCC 2d 1267 (1974) (petition dismissed because of its “pervasive lack of specificity and documentation” necessary to support its allegations); *A.C. Elliott, Jr.*, 61 FCC 2d 682 (1976) (petition dismissed because it lacked specific allegations of fact pursuant to Section 309(d)(1)); *Corpus Christi Cellular Telephone Co.*, 3 FCC Rcd. 1889 (Comm. Carr. Bur., 1988) (petition dismissed for lack of a sufficient factual foundation).

²³ Petition at 10-12.

- The promotion of economic opportunities by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants, including small businesses, rural telcos, and businesses owned by minority groups and women [so-called “designated entities”];
- The recovery for the public of a portion of the value of the spectrum auctioned; and
- Efficient and intensive use of the electromagnetic spectrum.²⁴

Congress left to the Commission’s discretion which particular methodology should be employed to ensure compliance with these objectives. Indeed, Congress gave the Commission explicit instructions not to construe the Act to predetermine the outcome of PCS licensing.²⁵ Further, Congress specifically did not set aside licenses for any particular group; rather, it sought only to ensure that economic opportunities were made available so that a variety of groups, including small and minority-owned businesses, could participate in the competitive bidding process.²⁶

2. The Commission Has Fully Complied With its Statutory Obligation to Promote Designated Entity Participation

In implementing the broadband PCS licensing scheme, the Commission fully adhered to Congress’ objective of promoting broad-based participation in competitive bidding. In fact, the Commission has gone “above and beyond” its statutory obligation by setting aside frequencies for designated entities. Conspicuously absent from the Petition is any reference or

²⁴ 47 U.S.C. § 309(j)(3)(A-D). While Petitioners cite the Budget Act objectives, they ignore certain of those objectives entirely — *e.g.*, the objective of rapid development/ deployment of PCS services without delay. *Id.*

²⁵ H.R. Rep. No. 111, 103rd Cong., 1st Sess. at 256-57 (1993) (“*House Report*”).

²⁶ *Id.* at 255-56. In this regard, Congress recognized that some services would be inherently national in scope, while other services would be local and well-suited for small business participation. *Id.* at 254.

discussion of a number of Commission rules which have been established to ensure (1) that meaningful opportunities for designated entities are fully present; and (2) that there will be a wide dissemination of licenses in a wide variety of geographic areas, and to a wide variety of entities. A review of the Commission's PCS orders and rules makes this conclusion inescapable.

First, the Commission has established a number of different frequency blocks and service areas of varying sizes for PCS license auctioning. The Commission allocated PCS spectrum in this manner to reduce capital costs for designated entities and to ensure that established companies would not dominate the market.²⁷ This action, in itself, guarantees that PCS licenses will not be concentrated in the hands of a few licensees.²⁸

Moreover, the Commission imposed varying attribution limits on PCS and cellular ownership interests, again to ensure that there would not be excessive concentration of licenses in the hands of a few controlling entities.²⁹ The Commission also adopted specific spectrum aggregation limits to ensure "that no individual or person or a single entity is able to exert undue

²⁷ *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd. 5532, 5579 (1994), *recon. pending* ("Fifth R&O"). Indeed, a number of the companies targeted in the Petition here advocated substantially different bandwidth assignments and service areas; these proposals were rejected by the Commission on the basis that they might lead to fewer service providers and deter new entrants. *Memorandum Opinion and Order*, GEN Docket No. 90-314, 9 FCC Rcd. 4957, 4978-82 (1994) ("PCS Reconsideration Order").

²⁸ Two 30 MHz MTA blocks (A and B) were established for a nationwide service; a third 30 MHz BTA block (C), was set aside for designated entity participation. An additional 10 MHz BTA block (F) was set up as a second designated entity block; and two additional 10 MHz BTA blocks (D and E) were also established. *PCS Reconsideration Order* at 4975-86; *Fifth R&O* at 5587-88.

²⁹ *PCS Reconsideration Order* at 4997-5010.

market power through partial ownership in multiple PCS licensees in a single service area.”³⁰

Pursuant to Commission rules, PCS licensees may not have an ownership interest in frequency blocks that total more than 40 MHz and which serve the same geographic area.³¹ In addition, the Commission imposed even more rigid limits on the amount of PCS spectrum which may be held by cellular licensees in areas where there is a significant overlap between the designated PCS service area and a cellular licensee’s service area.³² The Commission also established a separate rule for designated entity licenses which limits the number of licenses applicants may obtain in the C and F Blocks.³³

The Commission has fully complied with Section 309(j) and has established licensing requirements which ensure there will be (1) a wide dissemination of licenses to a wide variety of PCS licensees; (2) meaningful opportunity for designated entities to bid for PCS licenses; and (3) no excessive concentration of licenses.³⁴

³⁰ *Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd. 7700, 7728 (1993) (“*Second R&O*”).

³¹ *See* 60 Fed. Reg. 26375 (1995) (to be codified at 47 C.F.R. § 24.229). A 45 MHz spectrum “cap” has also been placed on CMRS providers in general. 59 Fed. Reg. 59945 (1994) (to be codified at 47 C.F.R. § 20.6).

³² *Second R&O* at 7744. *See* 50 Fed. Reg. 32830 (1994) (to be codified at 47 C.F.R. § 24.204).

³³ *See* 59 Fed. Reg. 53463 (1994) (to be codified at 47 C.F.R. § 24.710) (stating that no applicant may be deemed the winning bidder of more than 98 (10 percent) of the licenses available for frequency blocks C and F).

³⁴ It should also be noted that despite the lack of bidding preferences in the A/B Block auction, both large and small companies participated in the auction. Further, large companies were not the only winners. There is, in fact, diversity among the A/B Block auction winners, with respect to size, ownership and numbers. The Commission’s rules did not prevent small businesses or minority bidders from participating in the A/B Block auctions, and suggestions to the contrary are specious.

3. **Petitioners' Headstart Claims Are Without Merit**

Petitioners also argue that the A/B Block winners will be given an unfair headstart over C Block PCS licensees — a headstart that will allegedly undermine the latter's competitive position.³⁵ The headstart argument, however, has been raised and rejected — both in the Commission's competitive bidding proceeding, and in the cellular licensing context where similar arguments were first raised. Once again, no Section 309(j) violation is presented.³⁶

First, Section 309(j) does not expressly require the Commission to consider an alleged "headstart" as a factor in its licensing rules. To the extent that the A/B winners' headstart goes to the Petitioners' claim of excessive concentration, Congress expressly relegated the issue to the Commission's broad discretion for resolution³⁷ and, as demonstrated above, no excessive concentration has occurred. Further, to the extent Petitioners claim that the A/B winners' headstart undermines bidding opportunities for designated entities, Petitioners conveniently ignore the Commission's no less important statutory obligation to promote rapid deployment of PCS services to the public.³⁸

³⁵ Petition at 10.

³⁶ NABOB acknowledges that it previously raised headstart arguments in the PCS context and was unsuccessful. *Petition* at 9, 15-16. These arguments in the context of the Petition are an improper/untimely attempt to seek reconsideration of prior Commission decisions on this issue.

³⁷ *House Report* at 254.

³⁸ Indeed, Congress' concern for the delays and inefficiencies of the lottery licensing process dominate Section 309(j)'s legislative history. In the PCS arena, this concern manifests itself in the imposition of a quick deadline to commence PCS licensing and in Section 309(j) itself. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(d); see generally *House Report*.

The Commission properly incorporated Congress' concern for rapid deployment of service into its administration of the auction process. In the *Fourth Memorandum Opinion and Order*, for example, the Commission affirmed its decision to use a sequence of auctions to license broadband PCS.³⁹ There, the Commission expressly rejected the argument that the staggered PCS auctioning sequence needed to be revised to prevent the A/B Block winners from gaining an unfair headstart over other PCS licensees.⁴⁰ The Commission concluded that auctioning the A/B Block first would provide designated entities with important information about the value of PCS licenses which would, in turn, assist designated entities in attracting capital and formulating bid strategies. The Commission also declined to delay the final licensing of the A/B Block winners, noting that the overriding public interest in rapid deployment of service outweighed the risk of a possible headstart advantage to the A/B Block winners.⁴¹

³⁹ *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd. 6858, 6863-64 (1994).

⁴⁰ *Id.*

⁴¹ *Id.* at 6864. As noted, Petitioners are improperly seeking reconsideration of this decision; for this reason, also, the Petition should be summarily denied. The Wireless Telecommunications Bureau ("Bureau") already followed the *Fourth Memorandum Opinion and Order* in ruling on the earlier motion to defer A/B Block licensing filed by Communications One, Inc. The Bureau appropriately found that staying A/B licensing would undermine the public interest in rapid PCS service deployment and also noted that staggered licensing gives later bidders valuable information concerning the business planning/deployment activities of the A/B Block winners. *CI Order* at ¶¶ 6-7. There, the Bureau found CI's "emergency motion" amounted to an "untimely petition for reconsideration. . . ." *Id.* at ¶ 5.

Headstart arguments were also previously raised and rejected in the cellular context — where a similar effort to delay licensing of wireline companies was posed.⁴² The Commission at that time agreed to consider moratorium requests for wireline licensing if the nonwireline cellular applicant could demonstrate public interest harm resulting from wireline's alleged headstart; however, no parties filing such requests met the necessary burden.⁴³

Importantly, the Commission's and industry's experience in cellular utterly belies Petitioners' headstart claims. First, nonwireline cellular winners have proven to be effective competitors of the wireline-affiliated carriers. In all cellular markets, there is competitive parity between the A and B Block carriers and, thus, there was no meaningful (or lasting) competitive advantage to being licensed first. In addition, recent penetration figures for cellular reflect that approximately 10% of the country receives cellular service,⁴⁴ leaving enormous marketing and service opportunities for prospective C Block PCS bidders and other wireless service providers. Finally, post-auction transactions and resale opportunities will also likely be available.⁴⁵ Based on

⁴² *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, Report and Order*, 86 FCC 2d 469, 491 n.57 (1981), *recon.*, 89 FCC 2d 58 (1982).

⁴³ *See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd. 6185, 6226 (1991).

⁴⁴ *See* Donaldson, Lufkin & Jenrette, Winter 1994-95 Wireless Communications Industry at 13, Table 4; 1995 Wireless Industry Survey Results: "American Success Story" Continues, March 13, 1995 (CTIA Press Release).

⁴⁵ The Commission has tentatively concluded that "the existing obligation on cellular providers to permit resale should be extended to apply to CMRS providers, unless there is a showing that permitting resale would not be technically feasible or economically reasonable for a specific class of CMRS providers." *Interconnection and Resale*
(continued...)

the cellular industry experience, and the vast untapped market for wireless services generally, it is clear that significant economic opportunities remain for all PCS providers.

C. Petitioners' Anticompetitive Claims Are Scandalous and Unsupported

In a clearly desperate effort to persuade the Commission to controvert its statutory obligation to promote rapid deployment and delay the licensing of the A/B Block winners, Petitioners make several scandalous statements about the winning bidders' conduct during the MTA auction — statements most notable for the absence of any factual support. These inflammatory statements serve only to underscore the fact that the Petition was filed only to delay the Commission's PCS licensing process.

Petitioners assert that “[t]he PCS bidding which resulted for the A and B frequencies took on the classic characteristics of a ‘territorial allocation,’ an unfair business practice under existing antitrust law.”⁴⁵ As “support” for its claim that PRIMECO and others have violated the antitrust laws, Petitioners point to AT&T's acquisition of McCaw Communications;

⁴⁵ (...continued)
Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Second Notice of Proposed Rule Making*, FCC 95-149 at ¶ 83 (released Apr. 20, 1995). This provision is specifically designed to, *inter alia*, mitigate headstart advantages among licensees. *Id.* at ¶ 84.

⁴⁶ Petition at 12.

the formation of PRIMECO; the alliance of Sprint, Cox Communications, and Comcast; and the fact that none of these entities bid for PCS licenses in those markets in which one of its members owned a significant cellular interest.⁴⁷

In the first instance, the merger of AT&T with McCaw was reviewed and approved by the Department of Justice and by this Commission. Further, the PRIMECO and WirelessCo alliances conformed with Commission rules and their existence was fully disclosed to the Commission.⁴⁸ Either the Commission or the Department of Justice could have lodged an objection to the formation of these entities, or could have launched an investigation, if anti-competitive concerns regarding the MTA auction were present. To date, neither agency has done so. Indeed, it is difficult to believe that government intervention would not have occurred before today if a violation of the antitrust laws on the scale described by Petitioners appeared even remotely probable. In this regard, the recklessness of Petitioners' claims is further reflected in the fact that the NAACP previously attempted to initiate a Justice Department antitrust investigation into the conduct of the MTA auction — and was unsuccessful.⁴⁹ Petitioners' failure to mention this relevant fact is disturbing — and further calls into question their motives herein.

⁴⁷ *Id.* at 11-12. That is to say, PRIMECO did not bid for PCS frequencies in markets where Bell Atlantic, NYNEX, U S WEST, or AirTouch own significant cellular interests. Presumably, AT&T and WirelessCo acted in like fashion.

⁴⁸ See PRIMECO and WirelessCo Form 175 and Form 600 filings.

⁴⁹ See letter from NAACP, to the Honorable Janet Reno (Feb. 13, 1995).

Further, the extent of bidding activity for the 99 MTA licenses, and the winning bid amounts made for these licenses, belie any claim of concerted anticompetitive activity.⁵⁰ Simply put, the “territorial allocation” scheme NABOB claims to have discovered does not exist. PRIMECO engaged in no collusive bidding and disclosed to the Commission, as required by the auction rules, the agreement that the partnerships’ owners (Bell Atlantic, AirTouch, NYNEX and U S WEST) had reached among themselves.⁵¹ The bidding that occurred for the MTA markets reflected PRIMECO and other individual bidders’ business plans and strategies. Claims that PCS bidding activity were driven (or even influenced) by other, sinister factors is entirely without support.

Moreover, Petitioners’ allegation that PRIMECO’s bidding patterns (or the bidding patterns of other bidders) somehow reflected a tacit agreement not to bid against other RBOCs reflects simple ignorance of the Commission’s auction rules. Pursuant to Section 24.204, cellular carriers are prohibited from obtaining licenses for broadband PCS in excess of 10 MHz in markets that would “result in a significant overlap of the PCS licensed service area(s). . . and the cellular geographic area(s).” Simply put, PRIMECO and others were prohibited from holding

⁵⁰ As noted above, the winning bid amounts for the A/B licenses total over \$7 billion, hardly evidence of a tacit agreement to divide up the PCS market licenses.

⁵¹ See PRIMECO Form 175 and Form 600 filings.

significant PCS interests in markets where their partners (and affiliates) had cellular operations.⁵²

This rule explains why PRIMECO and others did not bid in certain markets.

Petitioners also ignore the Certifications included in the Form 175 and Form 600 filings made by PRIMECO and other A/B Block bidders. Pursuant to Section 1.2105 of the rules, each applicant had to disclose in its Form 175 the names of all parties with whom they had entered into “partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned.” A review of PRIMECO’s Form 175 and Form 600 applications demonstrates that PRIMECO entered into no such agreements with others with respect to the A/B Block auction. In a declaration attached to this filing, George F. Schmitt, the President and Chief Executive Officer of PRIMECO, confirms that there were no agreements, tacit or otherwise, between PRIMECO and other A/B MTA bidders concerning the MTA bidding process or the post-auction PCS market structure.⁵³

Finally, attached hereto is a declaration by Dr. Robert G. Harris.⁵⁴ In his declaration, Dr. Harris provides a factual rebuttal to the anticompetitive claims raised in the Petition, concluding that:

⁵² In general, Section 24.204 also prevents any entity owning 20 percent or more of a cellular license covering 10 percent or more of the “pops” in the overlapping PCS market from having an interest greater than five percent in the overlapping PCS license. Thus, in the case of PRIMECO, for example, this rule prevented it from bidding for the PCS license in the New York area because of the Bell Atlantic/NYNEX ownership of the B band cellular license there.

⁵³ See Declaration of George F. Schmitt, dated May 24, 1995 (Attachment 1 hereto).

⁵⁴ See Declaration of Dr. Robert G. Harris (Associate Professor, Walter A. Haas School of Business, University of California, Berkeley; Principal, Law and Economics Consulting Group), dated May 23, 1995 (Attachment 2 hereto).

there was vigorous competition among the [MTA Block A/B] bidders; there was no tacit agreement among them to restrain their bidding; there was no allocation of MTAs among the bidders; and the winning prices of the A and B licenses were established by a highly competitive bidding process.⁵⁵

In sum, Petitioners' anticompetitive claims have no basis in fact.

CONCLUSION

Section 309(d)'s standing and evidentiary requirements were enacted "to stem the tide of continuing tactical delays" in the licensing process.⁵⁶ Under this Section, parties who have no legitimate interest in the outcome of the proceeding are precluded from filing petitions with


⁵⁵ *Id.* at 3.

⁵⁶ *Petition to Deny Order* at 95 (citing Hearings Before the Subcomm. on Communications & Power of the House Comm. on Interstate & Foreign Commerce, 86th Cong., 2d Sess. 30 (1960) (statement of FCC Chairman Frederick W. Ford)); Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate Foreign Commerce, 86th Cong., 1st Sess. 55-57, 67-68 (1959) (statement of J. Roger Wollenberg on behalf of the Federal Communications Bar Ass'n).

“the purpose of delaying licensing grants which properly should be made.”⁵⁷ In this case, Petitioners have raised no legitimate reason why PRIMECO’s MTA applications should be denied. For the reasons discussed herein, the Petition should be summarily rejected and PRIMECO’s 11 MTA applications expeditiously granted.

Respectfully submitted,

PCS PRIMECO, L.P.

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⁵⁷ *Id.* at 94 (citing S. Rep. No. 44, 82nd Cong., 1st Sess. 8 (1951)).